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No. 90-1689

In the Supreme Court of the United States

OCTOBER TERM, 1991

GIUSEPPE GAMBINO, AKA JOE, AND MATTEO ROMANO,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, under the doctrine of collateral estoppel, petitioner Gambino's previous acquittal on a drug conspiracy charge bars the government from introducing any evidence of the drug conspiracy in support of the instant CCE and RICO conspiracy charges against Gambino.

2. Whether the CCE count against Gambino is barred by the Double Jeopardy Clause because of his previous acquittal on the drug conspiracy charge.

3. Whether the RICO conspiracy count against both petitioners is barred by the Double Jeopardy Clause because of their previous acquittals on drug conspiracy charges.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	21

TABLE OF AUTHORITIES

Cases:

Abney v. *United States*, 431 U.S. 651 (1977) 7

Garrett v. *United States*, 471 U.S. 773 (1985) 7, 10, 11, 13, 14, 16, 17, 20

Grady v. *Corbin*, 110 S. Ct. 2084 (1990) 7, 14, 15, 16, 20, 21

Jeffers v. *United States*, 432 U.S. 137 (1977) 11, 12

United States v. *Aguilar*, 849 F.2d 93 (3d Cir. 1988) 13

United States v. *Brooklier*, 637 F.2d 620 (9th Cir. 1980), cert. denied, 459 U.S. 1206 (1983) 17

United States v. *Calderone*, 917 F.2d 717 (2d Cir. 1990), petition for cert. pending, No. 90-1527 ..... 15, 21

United States v. *Esposito*, 912 F.2d 60 (3d Cir. 1990) 20

United States v. *Felix*, 926 F.2d 1522 (10th Cir. 1991), petition for cert. pending, No. 90-1599 ..... 7, 15, 21

United States v. *Gonzalez*, 921 F.2d 1530 (11th Cir. 1991), petition for cert. pending, No. 90-7857 ..... 16, 20

United States v. *Grayson*, 795 F.2d 278 (3d Cir. 1986), cert. denied, 481 U.S. 1018 (1987) 12, 13, 16

United States v. *Korfant*, 771 F.2d 660 (2d Cir. 1985) 5

United States v. *Link*, 921 F.2d 1523 (3d Cir. 1990) 20

United States v. *MacDougall*, 790 F.2d 1135 (4th Cir. 1986) 17

United States v. *Marable*, 578 F.2d 151 (5th Cir. 1978) 17-18

Cases—Continued: Page

United States v. *Persico*, 774 F.2d 30 (2d Cir. 1985) 19
United States v. *Pungitore*, 910 F.2d 1084 (3d Cir. 1990), cert. denied, 111 S. Ct. 2009 (1991) 14, 20
United States v. *Roman*, 646 F. Supp. 1568 (S.D.N.Y. 1986), rev'd, 822 F.2d 261 (2d Cir.), cert. denied, 484 U.S. 954 (1987) 13
United States v. *Ruggiero*, 754 F.2d 927 (11th Cir.), cert. denied, 471 U.S. 1127 (1985) 17
United States v. *Russo*, 906 F.2d 77 (2d Cir. 1990) .. 15, 20, 21
United States v. *Scarpa*, 913 F.2d 993 (2d Cir.), cert. denied, 111 S. Ct. 57 (1990) 14, 16
United States v. *Schell*, 775 F.2d 559 (4th Cir. 1985), cert. denied, 475 U.S. 1098 (1986) 16-17
United States v. *Sperling*, 560 F.2d 1050 (2d Cir. 1977) 14
United States v. *Watchmaker*, 761 F.2d 1459 (11th Cir. 1985) 17

Constitution and statutes:

U.S. Const. Amend. V (Double Jeopardy Clause) .. 5, 6, 7, 11, 15, 16
18 U.S.C. 1962(d) 2
21 U.S.C. 846 ..... 2, 11
21 U.S.C. 848 2
21 U.S.C. 848(c)(2)(A) 12
21 U.S.C. 963 2

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 920 F.2d 1108. The order and opinion of the district court (Pet. App. 19a-66a) is reported at 729 F. Supp. 954.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1990. The petition for rehearing was denied on February 1, 1991. Pet. App. 17a-18a. The petition for a writ of certiorari was filed on May 2, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On August 30, 1989,[1] a grand jury sitting in the United States District Court for the Southern District of New York returned a seven-count indictment against 15 defendants. The indictment charged petitioner Gambino with, *inter alia*, conspiring to import heroin and cocaine, in violation of 21 U.S.C. 963 (Count 1); conspiring to distribute or to possess with intent to distribute heroin and cocaine, in violation of 21 U.S.C. 846 (Count 2); conducting a continuing criminal enterprise, in violation of 21 U.S.C. 848 (Count 3); and conspiring to participate in the affairs of an enterprise through a pattern of racketeering activity, in violation of the RICO statute, 18 U.S.C. 1962(d) (Count 7). The indictment charged petitioner Romano with RICO conspiracy but not with CCE.[2] Petitioners subsequently moved to dismiss the various counts on double jeopardy grounds, and the district court denied the motion. Pet. App. 19a-66a. Petitioners took an interlocutory appeal. The court of appeals reversed the denial of Gambino's motion to dismiss Counts 1 and 2, and remanded for a determination whether to dismiss those

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[1] Both courts below mistakenly stated that the indictment was returned on December 14, 1989. See Pet. App. 5a, 21a. The original indictment was returned on December 14, 1988, but the sixth superseding indictment, on the basis of which this appeal was taken, was returned on August 30, 1989. Gambino C.A. App. 9.

[2] Romano was also originally charged in Counts 1 and 2, but, during the pendency of this appeal, the case was remanded to the district court on the government's motion to enable the government to move to dismiss those counts as to Romano. Pet. App. 3a, 5a.

counts or to order redaction of the offending portions of the indictment. In all other respects, the court of appeals affirmed. Pet. App. 1a-16a.

1. The instant case involves an international narcotics business that operated for almost 20 years. Count 1, the drug importation conspiracy count, alleges a conspiracy to smuggle heroin and cocaine into this country. Count 1 lists 172 overt acts, including specific narcotics transactions, meetings, and communications between the defendants and their coconspirators. Gambino is named in 41 of those overt acts, including two relating to his participation in a March 1980 heroin importation scheme. See Count 1, Overt Acts 13, 14. Count 2, the drug distribution conspiracy count, incorporates the overt acts charged in Count 1. See Count 2 para. 5. Count 3, the CCE count, alleges that Gambino supervised a continuing criminal enterprise from January 1, 1975, to the date of the indictment, and it incorporates the conspiracy violations alleged in Counts 1 and 2 as predicate drug offenses. See Count 3 para. 1.

The RICO conspiracy count, Count 7, alleges a pattern of racketeering consisting of 42 predicate acts, including narcotics transactions, bribery, extortion, gambling, murder, and obstruction of justice. Those offenses were alleged to have occurred between January 1, 1970, and the date of the indictment. The drug conspiracies charged in Counts 1 and 2 account for two of the predicate acts of racketeering alleged against Gambino. See Count 7, Racketeering Acts 1 and 2.[3] Gambino was charged with 21 additional

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[3] The government dismissed the narcotics conspiracy charges against Romano, which resulted in the deletion of Romano's name from the RICO predicate acts corresponding to Counts 1 and 2. Pet. App. 5a.

predicate acts, including four murders, and Romano was charged with ten predicate acts.

2. Previously, in 1981, Gambino was acquitted of charges that he conspired, between August 1, 1979, and March 18, 1980, to import heroin into the United States. The government's evidence in that case consisted primarily of testimony from Frank Rolli, a government informant, who penetrated the alleged conspiracy of Gambino and co-defendant Emanuele Adamita to import heroin from Italy to the United States. Rolli testified that he met with Gambino and Adamita in Brooklyn on two occasions in March 1980; that the three men discussed a plan to smuggle ten kilograms of heroin through customs at Kennedy Airport; that Gambino agreed to pay him $30,000 for his assistance; that Rolli and Adamita traveled to Italy to obtain the heroin; and that, while they were in Italy, the amount of heroin to be imported increased from ten to 40 kilograms. Pet. App. 3a-4a. The plot was foiled when the heroin was seized, but the two March 1980 meetings were charged as overt acts 13 and 14 in Counts 1 and 2 of the instant indictment.

3. In 1989, Romano was acquitted of conspiring to import and distribute heroin and cocaine. The indictment in that case alleged that Romano and 26 others conspired to import narcotics from Italy to the United States between January 1, 1985, and June 30, 1988. The indictment charged 105 overt acts, including the use of couriers to transport cocaine to Italy in order to exchange the cocaine for heroin and return the heroin to the United States. The indictment also alleged that legitimate businesses, including pizza parlors and a clothing store, were used as fronts to distribute the narcotics. Romano was named in four overt acts alleging meetings with co-defendant

Adamita. Pet. App. 4a-5a. Gambino was not charged in that indictment.

4. Petitioners filed pretrial motions to dismiss the counts against them in the present indictment on double jeopardy grounds.[4] First, the district court rejected Gambino's contention that the drug conspiracy counts (Counts 1 and 2) violated the Double Jeopardy Clause in light of his previous acquittal of drug conspiracy in 1981. In so doing, the court applied the totality of the circumstances test of *United States* v. *Korfant*, 771 F.2d 660 (2d Cir. 1985), to determine whether the earlier- and later-charged conspiracies were the same. Pet. App. 28a-31a, 37a. The court concluded that there was "insufficient similarity" between the conspiracies to warrant dismissal. *Id.* at 29a. In particular, the court relied on the following factors: that only two of the 41 overt acts charged against Gambino in Counts 1 and 2 concern events covered in the 1981 trial, *id.* at 30a; that Counts 1 and 2 contain detailed allegations of drug activity having no relation to the earlier charges, *ibid.*; that some of the events alleged in Counts 1 and 2 occurred after the 1981 acquittal, *ibid.*; that, apart from Gambino and a government informant, only one of the 15 defendants and 27 co-conspirators named in the instant indictment was involved in the 1981 case, *ibid.*; and that the 1981 case involved an importation conspiracy, whereas the Count 2 conspiracy in this case charges a distribution conspiracy, *id.* at 37a.

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[4] In the district court, Gambino mounted double jeopardy challenges only to Counts 1, 2, and 3; he did not challenge Count 7, the RICO conspiracy count. The court of appeals nonetheless addressed Gambino's argument, made for the first time in that court, that Count 7 too was jeopardy-barred. See Pet. App. 14a n.2.

Although ruling against Gambino on the double jeopardy claim, the court agreed with Gambino that, in proving the Count 1 importation conspiracy, the government should be barred, on grounds of collateral estoppel, from introducing evidence of Gambino's alleged involvement in the 1980 importation scheme. Pet. App. 35a. The court concluded that "the 1981 jury simply did not believe that the government had sustained its burden of proving Gambino's guilt beyond a reasonable doubt." *Id.* at 36a. With respect to the Count 2 distribution conspiracy, however, the court declined to bar the government from proving the 1980 importation scheme. The court concluded that the 1981 jury's acquittal of Gambino on the importation conspiracy charge did not amount to a finding that he did not conspire to distribute narcotics. *Id.* at 38a.

The court then rejected Gambino's contention that the CCE count violates the Double Jeopardy Clause because of its inclusion of the Count 1 and 2 conspiracies as predicate drug offenses. Having refused to dismiss either of the drug conspiracy counts on double jeopardy grounds, the court concluded that the CCE count need not be dismissed either. Pet. App. 39a.

Finally, the court rejected Romano's argument that his 1989 acquittal precluded prosecution on the RICO conspiracy count. Finding that only one of the predicate racketeering acts alleged against Romano had been considered in the earlier conspiracy prosecution, the court held that the RICO conspiracy count did not constitute the same offense as the 1989 narcotics conspiracy charge, and that the RICO conspiracy prosecution therefore did not violate the Double Jeopardy Clause. Pet. App. 50a-51a.

5. Petitioners took an interlocutory appeal under *Abney* v. *United States*, 431 U.S. 651 (1977), renewing their double jeopardy claims.[5] The court of appeals held, first, that the district court's double jeopardy analysis with respect to Counts 1 and 2 was incorrect. Pursuant to the "same conduct" test adopted in *Grady* v. *Corbin*, 110 S. Ct. 2084 (1990), the court of appeals held that "the *Korfant* factors applied by the district court [were] inadequate to satisfy double jeopardy concerns," and that, because of the Double Jeopardy Clause, the overt acts for which Gambino had previously been prosecuted "[could] not remain in [Counts 1 and 2]." Pet. App. 12. Accordingly, the court vacated the district court's order and remanded for that court to determine whether to dismiss Counts 1 and 2 or to redact the offending overt acts. *Ibid.*[6]

The court of appeals upheld the denial of the motions to dismiss the CCE and RICO conspiracy counts. The court relied on the holding in *Garrett* v. *United States*, 471 U.S. 773 (1985), that "it does not violate the Double Jeopardy Clause . . . to prosecute [a] CCE offense after a prior conviction for one of the predicate offenses." Pet. App. 13a, quoting *Garrett*, 471 U.S. at 793. The court concluded that "[t]his case presents just such a situation because several of the predicate acts constituting the CCE charged against Gambino and the RICO conspiracy charged against Gambino and Romano occurred after their previous

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[5] The government did not take an appeal from the exclusion of evidence of the 1980 importation scheme to prove Count 1.

[6] We have filed a petition for a writ of certiorari as to this aspect of the Second Circuit's decision, asking that the petition be held and disposed of in light of this Court's disposition of our petition for a writ of certiorari in *United States* v. *Felix*, No. 90-1599.

prosecutions." Pet. App. 14a. The court held that *Grady*, having cited *Garrett* with "apparent approval," did "not disturb this rationale." *Id.* at 15a.

ARGUMENT

1. The CCE and RICO conspiracy counts against Gambino each allege as predicate acts the Count 1 drug importation conspiracy and the Count 2 drug distribution conspiracy. Count 1 and Count 2 each name Gambino in two overt acts relating to the 1980 heroin importation scheme. Gambino contends (Pet. 11-13) that, under the doctrine of collateral estoppel, his acquittal on the importation conspiracy charge arising out of that scheme bars the government from proving the scheme in support of the CCE and RICO conspiracy counts.

Gambino's collateral estoppel claims do not warrant further review at this time. First, neither court below expressly ruled on whether the government could introduce proof of the 1980 scheme to establish the predicate acts corresponding to Counts 1 and 2 in the CCE and RICO conspiracy counts. The district court's discussion of the collateral estoppel issues raised by Gambino suggests that the court was unaware that Gambino intended his collateral estoppel argument to apply to the CCE and RICO conspiracy counts in addition to Counts 1 and 2, see Pet. App. 32a-37a, 38a-39a, and the court of appeals' opinion also does not reflect awareness of the intended scope of Gambino's collateral estoppel claim.[7] Gambino's collateral estoppel argument as to the CCE and

[7] The portions of Gambino's filings concerning collateral estoppel in the district court, as well as in the court of appeals, do not mention the RICO conspiracy count at all.

RICO conspiracy counts thus will remain open when the case is returned to the district court for trial.[8] There is no reason to believe that that court, if given the opportunity, will not resolve those issues appropriately. If Gambino is dissatisfied with that court's rulings, any perceived errors may be raised in an appeal from a final judgment of conviction, if he should be convicted after trial.

Second, the question whether the government may introduce evidence of the 1980 importation in support of the predicate acts in the CCE and RICO conspiracy counts corresponding to Counts 1 and 2 turns on a determination of the basis for the jury's acquittal of petitioner in 1981.[9] That fact-bound determination does not warrant further review by this Court.

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[8] In our view, the question whether proof of the 1980 importation may be introduced in support of the CCE and RICO predicate acts corresponding to Counts 1 and 2 turns entirely on whether proof of that importation may be introduced in support of Counts 1 and 2 themselves. It follows that the district court's decision to preclude proof of the 1980 conspiracy as to Count 1 would preclude the same proof as to the predicate acts corresponding to Count 1 in the CCE and RICO conspiracy counts. As to Count 2, the district court's decision not to preclude such proof currently stands unreversed. That ruling would thus permit the government to introduce evidence of the 1980 importation as to the predicate acts corresponding to Count 2 in the CCE and RICO conspiracy counts.

[9] As the district court held, Pet. App. 38a, Gambino's acquittal established *only* a failure of proof that he agreed to import heroin. The acquittal did not necessarily preclude a determination that he agreed to participate in the distribution of the heroin following its importation, and thus did not preclude proof of the 1980 importation as to Count 2. That conclusion follows from Rolli's testimony, Gov't C.A. Br. 22, that his two conversations with Gambino and Adamita were

2. Petitioner Gambino contends (Pet. 13-20) that his previous acquittal of drug importation conspiracy forecloses his prosecution on the instant CCE count. The courts below correctly rejected this claim.

a. To begin with, *Garrett* v. *United States*, 471 U.S. 773 (1985), establishes that the CCE count is not barred merely because, by charging the Count 1 and 2 drug conspiracies as predicate drug offenses, the CCE count specifically incorporates the overt acts arising from the previously prosecuted 1980 importation scheme.

In *Garrett*, this Court held that the Double Jeopardy Clause did not bar the use of a drug importation offense, for which the defendant had previously been prosecuted, as a predicate offense in a CCE prosecution. After determining that Congress intended to allow separate prosecutions for CCE and its predicate offenses, 471 U.S. at 779-786, the Court went on to express "serious doubts" that the predicate drug violations were lesser included offenses within CCE, *id.* at 790, cautioning against the "ready transposition of the 'lesser included offense' principles of double jeopardy from the classically simple situation [of a single course of conduct] to the multilayered conduct, both as to time and to place, involved in this case," *id.* at 789. Rather, the Court stated that "[q]uite obviously the CCE offense is not, in any common-sense or literal meaning of the term, the 'same' offense as

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marked by considerable disagreement about, among other things, the size and method of the importation. In light of Rolli's testimony about those conversations, it is entirely possible that the jury concluded that Gambino declined to join the charged importation conspiracy, but did not conclude that Gambino's reluctance extended to the distribution of narcotics, as charged in Count 2.

one of the predicate offenses." *Id.* at 786. Nevertheless, assuming *arguendo* that CCE and its predicate offenses are the same offense, the Court concluded that the successive prosecutions did not violate the Double Jeopardy Clause because the CCE offense continued after the date of the indictment for the predicate offense. *Id.* at 791-793.

The result in this case follows *a fortiori* from *Garrett*. First, the predicate acts here bear even less similarity to lesser included offenses of CCE than was the case in *Garrett*. While in *Garrett* the defendant had previously been prosecuted for a predicate act charged in the CCE count, in this case Gambino has never been prosecuted for either of the predicate acts at issue—the Count 1 and 2 conspiracies—but only for a conspiracy based on evidence of 2 of the 41 overt acts charged in those counts. Second, even assuming that Gambino had been previously prosecuted for the CCE predicate acts corresponding to Counts 1 and 2 and that those predicate acts were lesser included offenses of CCE, Gambino's successive prosecutions are permissible because the CCE offense, as charged, continued to the date of the instant indictment in 1989, far past the date of Gambino's 1981 indictment for the importation scheme.

b. Gambino also contends (Pet. 17-20) that, regardless of whether previously prosecuted drug offenses may generally be used as predicate acts in a CCE prosecution, the conspiracy to import drugs of which he was acquitted was a lesser included offense of the CCE offense charged in the present indictment. In *Jeffers* v. *United States*, 432 U.S. 137 (1977), a plurality of this Court assumed, without deciding, that a conspiracy to distribute drugs under 21 U.S.C. 846 is a lesser included offense of CCE, and that the government may not successively prosecute for the

two offenses. 432 U.S. at 149-150. However, the "assumption" of the *Jeffers* Court must be viewed in the context of that case, in which the CCE charge was essentially coterminous with the conspiracy charge. As the Court observed, the two drug charges in the *Jeffers* case covered "the identical agreement and transactions over the identical time period." *Id.* at 150 n.15. See *United States* v. *Grayson*, 795 F.2d 278, 285 (3d Cir. 1986), cert. denied, 481 U.S. 1018 (1987).

By contrast, as the overt acts section of the Count 1 conspiracy shows, the CCE charge in the instant case includes several drug offenses committed by Gambino in addition to the 1981 importation conspiracy, some of which occurred after the date of the 1981 indictment. In these circumstances, successive prosecutions are permissible. The *Jeffers* plurality based its assumption that drug conspiracy is a lesser included offense of CCE on the premise that the "in concert" element of a CCE offense requires proof of a conspiratorial agreement.[10] 432 U.S. at 149-150. That rationale bars successive prosecutions, however, only when the conspiracy prosecution and the CCE prosecution rest on essentially identical agreements. It does not apply where, as here, the CCE conviction encompasses both different and later joint activity. Under a contrary rule, the government would be forced to choose between prosecuting a defendant for drug conspiracy or releasing him with the idea that he would continue his drug activity so that the govern-

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[10] Under 21 U.S.C. 848(c)(2)(A), a CCE defendant must have engaged in a continuing series of drug violations "in concert with five or more other persons with respect to whom [he] occupies a position of organizer, a supervisory position, or any other position of management."

ment might catch him twice more and then be able to prosecute him under CCE—a situation the Court in *Garrett* characterized as "absurd." 471 U.S. at 785-786.

United States v. *Aguilar*, 849 F.2d 93 (3d Cir. 1988), cited by Gambino, is not to the contrary. In *Aguilar*, the court of appeals barred the defendant's CCE prosecution because of his previous conviction for drug conspiracy. But in *Aguilar*, as in *Jeffers*, the conduct underlying both offenses was the same. 849 F.2d at 94, 98. The court in *Aguilar* pronounced the rule, which is wholly consistent with our argument here, that a drug conspiracy is a lesser included offense of a CCE offense only in a case "where the same activities were the basis for each crime." *Id.* at 98. Indeed, in another Third Circuit case, *United States* v. *Grayson*, *supra*, the court held that the defendant's previous drug conspiracy prosecutions did not bar a later CCE charge because there, as here, "the CCE charge included numerous offenses both distinct from the two major conspiracy convictions as well as subsequent to the date of indictment in each of the prior cases." 795 F.2d at 285.[11]

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[11] Nor is petitioner helped by the district court decision in *United States* v. *Roman*, 646 F. Supp. 1568 (S.D.N.Y. 1986), rev'd on other grounds, 822 F.2d 261 (2d Cir.), cert. denied, 484 U.S. 954 (1987). There, in dismissing a CCE count on speedy trial grounds, the court held that the speedy trial clock began to run on the filing date of the underlying drug conspiracy charge rather than on the date of the superseding indictment charging the CCE offense, because the CCE and conspiracy charges constituted the same offense. It is not clear from the opinion in *Roman* whether the two charges rested on the same facts. In any event, to the extent that the court of appeals decision here conflicts with the district court

c. In support of his double jeopardy claim, Gambino invokes *Grady* v. *Corbin*, 110 S. Ct. 2084, 2087 (1990), in which the Court held that "the Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted." *Grady*, however, does not help Gambino's cause.

First, the *Grady* test has no application in the CCE context. In *Grady*, the successive prosecutions involved simple offenses—misdemeanor traffic violations and homicide—that occurred simultaneously during a single course of conduct spanning a brief period of time. A CCE charge, by contrast, entails proof of multiple drug violations committed in furtherance of an ongoing enterprise and occurring over an extended time span. As the Court stated in *Garrett*, 471 U.S. at 788, CCE does not "lend itself to the simple analogy of a single course of conduct."

Further, *Grady* did not renounce the rule allowing successive prosecutions where, as here, the offense charged in the later case had not been completed at the time of the indictment in the earlier case. See *United States* v. *Scarpa*, 913 F.2d 993, 1013-1014 n.8 (2d Cir.), cert. denied, 111 S. Ct. 57 (1990); *United States* v. *Pungitore*, 910 F.2d 1084, 1111, 1115 & n.37 (3d Cir. 1990), cert. denied, 111 S. Ct. 2009 (1991). As noted above, that rule was established quite clearly

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decision in *Roman*, *Roman* must be regarded as overruled. See *United States* v. *Sperling*, 560 F.2d 1050, 1059 (2d Cir. 1977) ("Congress did not intend §§ 846 and 848 to be offenses separately and simultaneously punishable *where the facts on which the violations rest are the same.*") (emphasis added).

in *Garrett*—a case cited in *Grady* with apparent approval, see 110 S. Ct. at 2091, 2094 n.15—and the *Grady* Court itself expressly reaffirmed that the Double Jeopardy Clause does not bar a subsequent prosecution where "the State is unable to proceed on the [later] charge at the outset because the additional facts necessary to sustain that charge have not occurred." 110 S. Ct. at 2090 n.7.[12]

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[12] In support of his invocation of *Grady*, Gambino cites the Second Circuit decisions in *United States* v. *Calderone*, 917 F.2d 717 (2d Cir. 1990), petition for cert. pending, No. 90-1527, and *United States* v. *Russo*, 906 F.2d 77 (2d Cir. 1990). Intracircuit conflicts, however, do not warrant this Court's review. In any event, those cases do not help Gambino. *Calderone* involved successive drug conspiracy prosecutions, not CCE or RICO conspiracy. *Calderone* thus did not raise any question concerning separate prosecution for CCE or RICO and predicate acts of those offenses, as does this case. In *Russo*, the Second Circuit accepted the government's concession that, on the facts of that case, *Grady* barred a prosecution for conduct that had been charged as predicate acts in an *earlier* RICO prosecution.

Nor do we believe that this petition should be held pending disposition of the government's petition in *United States* v. *Felix*, 926 F.2d 1522 (10th Cir. 1991), petition for cert. pending, No. 90-1599. Like *Calderone*, *Felix* does not involve a CCE or RICO conspiracy charge, but instead concerns the question whether the government may prosecute a defendant for substantive criminal conduct, and then, in a separate prosecution for conspiracy, ask the jury to infer the conspiratorial agreement in part from that same substantive criminal conduct. Because it is based on the view that the conduct at issue in a conspiracy prosecution is that conduct from which the government asks the jury to infer the conspiratorial agreement, *Felix* is relevant to the Second Circuit's holdings barring prosecution of Gambino on Counts 1 and 2. Accordingly, we have filed a petition for a writ of certiorari asking the Court to dispose of the Second Circuit's holdings as to Counts

Finally, even if *Grady* applied with full force to predicate acts charged in a CCE prosecution, Gambino's argument would be meritless. *Grady* bars a prosecution only when evidence of previously prosecuted conduct would "establish an essential element" of the offense charged in the later prosecution. 110 S. Ct. at 2087. Although proof of the 1980 importation would provide some evidence of the predicate acts corresponding to the Count 1 and 2 conspiracies and may be relevant in proving the existence of an "enterprise," proof of the importation alone could hardly be said to "establish" any essential element of the CCE offense charged.

3. Both petitioners contend (Pet. 13-16, 21-26) that their previous acquittals on drug conspiracy charges foreclose the instant RICO conspiracy count.

a. The courts of appeals to address the issue have uniformly held that the Double Jeopardy Clause permits successive prosecutions for non-RICO conspiracy and RICO conspiracy, even when the government uses some of the same evidence concerning the defendant's actions to prove both conspiracies. *E.g.*, *United States* v. *Gonzalez*, 921 F.2d 1530 (11th Cir. 1991), petition for cert. pending, No. 90-7857; *United States* v. *Scarpa*, 913 F.2d at 1013-1014; *United States* v. *Grayson*, 795 F.2d at 282-283; *United States* v. *Schell*, 775 F.2d 559, 568 (4th Cir. 1985), cert. de-

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1 and 2 in light of its disposition of *Felix*. See note 5, *supra*. The present petition, however, involves the propriety of separate prosecution for CCE and RICO conspiracy and for predicate acts named in the CCE and RICO conspiracy charges. This Court's disposition of *Felix* is therefore unlikely to alter the analysis of the counts at issue in this petition.

nied, 475 U.S. 1098 (1986); *United States* v. *Watchmaker*, 761 F.2d 1459, 1466-1468 (11th Cir. 1985); *United States* v. *Brooklier*, 637 F.2d 620 (9th Cir. 1980), cert. denied, 459 U.S. 1206 (1983). Cf. *Garrett* v. *United States*, 471 U.S. at 786, 789-790 (suggesting that complex offenses like RICO are not the "same offense" for double jeopardy purposes as their underlying predicate acts). The court of appeals' decision that petitioners' previous acquittals on drug conspiracy charges does not preclude later prosecution for RICO conspiracy thus comports fully with all prior federal appellate precedent.[13]

b. Even if a non-RICO conspiracy prosecution could in some instances preclude a subsequent RICO conspiracy charge, the RICO conspiracy charge against petitioners would not be barred, because the non-RICO and RICO conspiracies constituted separate offenses under the totality of the circumstances test traditionally employed by the courts to determine whether two conspiracies are the same for double jeopardy purposes. See, *e.g.*, *United States* v. *Ruggiero*, 754 F.2d 927, 932 (11th Cir.), cert. denied, 471 U.S. 1127 (1985); *United States* v. *MacDougall*, 790 F.2d 1135, 1144 (4th Cir. 1986); *United States* v.

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[13] Romano argues (Pet. 21-25) that even if successive prosecutions for non-RICO conspiracy and RICO conspiracy are permissible when the defendant was convicted for the non-RICO conspiracy, they are not permissible when the non-RICO conspiracy charge resulted in an acquittal. As illustrated by the district court's action in barring the government from introducing evidence of Gambino's participation in the 1980 importation scheme to prove Count 1, when the first prosecution results in acquittal the defendant is protected against future prosecutions under the doctrine of collateral estoppel. Romano does not claim in the petition that the doctrine of collateral estoppel would bar the present prosecution.

Marable, 578 F.2d 151, 154 (5th Cir. 1978). Pursuant to that test, the factors to be considered are the time periods of the conspiracies; the places where the pertinent events occurred; the identity of the coconspirators; the statutory offenses that were the objects of the conspiracies; and the overt acts committed in furtherance of the conspiracies. See *Marable*, 578 F.2d at 154.

Here, with respect to Gambino, although the eight-month time frame of the 1980 conspiracy was contained within the 20-year time frame of the RICO conspiracy, the RICO conspiracy commenced almost ten years before the beginning of the 1980 conspiracy and continued for almost ten years after the 1980 conspiracy terminated. Of the 23 predicate acts alleged against Gambino in the RICO count, 20 postdated Gambino's 1981 acquittal. Apart from Gambino, only one of the 15 RICO defendants also participated in the 1980 conspiracy. Only two of the predicate acts charged in the RICO count—the Count 1 and 2 conspiracies—related to the earlier conspiracy, and of the 41 overt acts charged against Gambino in Counts 1 and 2, only two pertained to the 1980 importation scheme. Finally, the earlier indictment charged a single, discrete scheme to import heroin, while the RICO indictment charged a broad conspiracy to violate the substantive provision of the RICO statute by committing numerous drug offenses, bribery, extortion, gambling, murder, and obstruction of justice. On this record, there can be no doubt that the two conspiracies were not the same.

Likewise, the RICO conspiracy was a separate offense from the drug conspiracy previously charged against Romano. The commencement of the RICO

conspiracy predated the earlier charged conspiracy by 15 years and outlasted it by 14 months. The district court found little overlap between the predicate acts of racketeering charged against Romano and the earlier charged conspiracy, and the RICO count alleges criminal activity by Romano that both predates and postdates the earlier indictment.[14] Pet. App. 50a-51a. Although there is some overlap among the participants in the two conspiracies, the large majority of the named co-defendants and co-conspirators was not the same, and the leadership of the two conspiracies was altogether different. The earlier conspiracy, moreover, involved strictly drug trafficking, while the RICO conspiracy, as indicated above, encompasses widely diverse criminal activity.

c. Quite apart from the differences for double jeopardy purposes between the earlier drug conspiracies and the RICO conspiracy, petitioners' double

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[14] Romano's contention (Pet. 25-26) that the RICO count does not accuse him of committing a single criminal act during the period between the indictments is incorrect. Racketeering Act 34 alleges that Romano engaged in a conspiracy to make extortionate extensions of credit and to use extortionate means to collect extensions of credit that continued up to the date of the instant indictment. An agreement with others to commit crimes is a criminal act itself. To the extent Romano disputes the charge that the loansharking conspiracy continued past the date of the earlier indictment, we note that the allegation in a RICO indictment of acts occurring after the date of a prior indictment for a predicate act "suffices to call for trial without any preliminary demonstration of supporting evidence." *United States* v. *Persico*, 774 F.2d 30, 33 (2d Cir. 1985). If the evidence at trial fails to support the allegation that Romano's participation in the RICO conspiracy continued beyond the date of the first indictment, Romano is not foreclosed from reasserting his double jeopardy claim based on that consideration.

jeopardy claim must fail in light of *Garrett*'s holding that successive prosecutions are permissible where the second-charged offense was not committed until after the earlier indictment. 471 U.S. at 791-792. The RICO conspiracy charged in this case continued for almost ten years past the date of Gambino's earlier indictment and for 14 months past the date of Romano's earlier indictment. Moreover, the indictment alleges that each petitioner personally engaged in racketeering after the return of the earlier indictment against him.

d. *Grady* v. *Corbin*, on which petitioners rely, has no more relevance in the RICO context than in the CCE context. Unlike the simple offenses involved in *Grady*, a RICO offense does not involve a single course of conduct covering a brief time span. Rather, like CCE, it is a compound-complex offense entailing proof of multiple criminal acts committed in furtherance of an ongoing enterprise and occurring over an extended period of time. Accordingly, it is as inappropriate to employ the "same conduct" test in analyzing a RICO prosecution as in analyzing a CCE case. The courts of appeals to address the issue have declined to apply *Grady* in RICO cases. *United States* v. *Gonzalez*, 921 F.2d at 1535-1539; *United States* v. *Link*, 921 F.2d 1523 (11th Cir. 1991); *United States* v. *Esposito*, 912 F.2d 60 (3d Cir. 1990); *United States* v. *Pungitore*, 910 F.2d at 1109-1111. But see *United States* v. *Russo*, 906 F.2d 77 (2d Cir. 1990) (accepting government's concession on facts of that case that *Grady* barred prosecution for acts that had been charged as predicate acts in a prior RICO prosecution).

In any event, as discussed earlier, see pp. 14-15, *supra*, *Grady* recognized an exception to the rule against successive prosecutions for the same conduct

where, as here, the more serious crime is still ongoing at the time of the indictment for the less serious one.[15]

Finally, Gambino's *Grady* argument is meritless because *Grady* bars a prosecution only when evidence of previously prosecuted conduct would "establish an essential element" of the offense charged in the later prosecution, 110 S. Ct. at 2087, and in this case proof of the 1980 importation could hardly be said to "establish" any such element. See p. 16, *supra.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[15] *United States* v. *Calderone, supra,* and *United States* v. *Russo, supra,* do not advance petitioners' attack on the RICO conspiracy count for the same reasons that they fail to advance Gambino's attack on the CCE count. See note 12, *supra.* And the pending petition in *United States* v. *Felix, supra,* is no more pertinent to petitioners' RICO challenge than to Gambino's CCE challenge. See note 12, *supra.*

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